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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 523

DOROTHY HENNESEY, doing business as HENNESEY & CO., a sole proprietorship,

Petitioner,

vs.

HENRY C. BROWN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MILTON K. JOSEPH
120 S. La Salle Street
Chicago 3, Illinois,
Attorney for Petitioner

Milton K. Joseph and
Byron G. Torbet
Of Counsel

THE BLAKELY PRINTING COMPANY, CHICAGO

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Supreme Court of the United States

OCTOBER TERM, 1960.

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DOROTHY HENNESEY, DOING BUSINESS AS HENNESEY & CO., A SOLE PROPRIETORSHIP.

Petitioner.

vs.

HENRY CROWN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Dorothy Hennesey, doing business as Hennesey & Co., a sole proprietorship, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on August 11, 1960.

OPINION BELOW.

The United States Court of Appeals for the Seventh Circuit filed no opinion.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit is dated and was entered on August 11, 1960 (R. 28). The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW.

Whether, where an appellant in the United States Court of Appeals elects to have the appendix to the transcript of the record printed under the direction of the clerk of the court pursuant to a rule of court, and the one printer designated by the clerk of the court to do all the clerk's printing of appendices is unable, because of limitations of the capacity of his plant, to complete the printing of the appendix within the time for filing, the court of appeals could properly dismiss the appeal for appellant's failure to file the appendix within the time required.

STATEMENT OF THE CASE.

This case is a derivative stockholder's suit brought by petitioner as plaintiff in the United States District Court for the Northern District of Illinois, Eastern Division, against Material Service Corporation and other defendants to set aside a plan of merger with General Dynamics Corporation, and for other relief, including a judgment against certain defendants in the sum of $12,500,000.00. Jurisdiction in the District Court was invoked on the ground of diversity of citizenship. The appeal to the United States Court of Appeals for the Seventh Circuit was taken from a judgment of the trial court dismissing the action.

The record on appeal was filed in the Court of Appeals on April 4, 1960 (R. 1). On appellant's motions the time for the filing of appellant's appendix and brief was ex-

tended to August 1, 1960 (R. 19). On July 26, 1960, 5 days before the due date for the filing of the appendix, appellant's attorney was advised by the printing company engaged by the clerk of the court for the printing of the appendix that other voluminous appendices awaiting completion would make it impossible to print appellant's appendix by August 1, 1960 (R. 21). Appellant thereupon, on July 28, 1960, filed a motion for a further extension of time to file her appendix and brief supported by affidavit of a representative of the printing company (R. 2-6). The motion was denied on August 3, 1960 (R. 14). On the next day, August 4, 1960, appellees filed a motion to dismiss the appeal for want of prosecution (R. 15), to which appellant filed an answer on August 9, 1960 accompanied by her appendix and brief, the printing of which was expedited by the court clerk's printer as soon as he was advised on August 3, 1960 by the clerk that the motion for the extension had been denied (R. 19-26). Appellant's answer included a motion for leave to file her appendix and brief instanter, and for a reconsideration by the court of the order entered August 3, 1960 denying appellant's motion for an extension of time (R. 25). The court of appeals denied all of the motions and dismissed the appeal (R. 28).

REASONS FOR THE ALLOWANCE OF THE WRIT.

The judgment of the court of appeals in dismissing the appeal is in conflict with similar rulings in other United States Courts of Appeals. See *Phillips* v. *Employers Mutual Liability Insurance Co. of Wisconsin* (C. A. 5th, 1956), 239 F. 2d 79, 80, footnote 2; *Arlon* v. *Greencha Holding Corp.* (C. A. 2d, 1956), 232 F. 2d 129, 130.

Extended research was made by petitioner on the precise question involved in this case, namely, whether a party

should be penalized because of the inability of a printer over whom he has no control and who was designated not by the party but by the clerk of the court, to print the party's appendix within the time required. No case involving this phase of federal practice has been discovered.

Rule 16(a) of the Rules of the United States Court of Appeals for the Seventh Circuit, provides in part as follows:

> "• • • Either party, if he so desires, may have the appendix printed under the direction of the clerk, but shall advance the cost thereof to the clerk. • • •"

The clerk of the United States Court of Appeals for the Seventh Circuit has designated one printer and one printer only to print all appendices in cases where parties have chosen to have the appendices printed under the clerk's direction. A special rate is charged by the printer in such cases and, as a result, printing done under the direction of the clerk of the court is done only after the printer's other work done for other customers at regular prices is out of the way (R. 24). Parties do not have control over the arrangement between the clerk of the court and the clerk's printing company concerning the printing of appendices (R. 24).

An important question of federal practice is involved since a conflict between deadline filing dates and the completion of printing work might result in serious prejudice to litigants. This is also an important question of federal law which has not been but should be settled by this court. This court should exercise its power of supervision over courts of appeal by requiring appropriate rules of practice to be passed governing the situation present in the case at bar.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition should be granted.

MILTON K. JOSEPH,
Attorney for Petitioner.

November 4, 1960.

PROOF OF SERVICE.

Received a copy of the foregoing petition for writ of certiorari this ..... day of November, 1960.

STUART S. BALL, HOWARD P. ROBINSON,
ROBERT T. BEAM, H. BLAIR WHITE,
AND FREDERIC F. BRACE, JR.,

By .....
Attorneys for General Dynamics Corporation, Respondent.

ALBERT E. JENNER, JR.,
SAMUEL W. BLOCK,
ROBERT E. PFAFF,

By .....
Attorneys for Henry Crown, et al., Respondents.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Thursday, August 11, 1960.

Before

Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.

DOROTHY HENNESSEY, etc.,
Plaintiff-Appellant,
No. 12996 *vs.*
HENRY CROWN, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This matter comes before the Court on appellees' motion to dismiss this appeal for want of prosecution, and the answer of appellant to appellees' motion to dismiss appeal for want of prosecution.

On consideration whereof, IT IS HEREBY ORDERED and adjudged by this Court that this appeal be, and the same is hereby, DISMISSED, for want of prosecution.

IT IS FURTHER ORDERED by the Court that that part of the answer of appellant to appellees' motion to dismiss appeal for want of prosecution which requests that this Court reconsider the order heretofore entered by this Court on August 3, 1960, denying appellant's motion for extension of time to file her appendix and brief, and for a further order allowing appellant to file her appendix and brief instanter, be, and the same is hereby DENIED.